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IN THE

Supreme Court of the United States

October Term, 1969

No. 135

FREDERICK WALZ,

Appellant,

against

TAX COMMISSION OF THE CITY OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

APPELLEE'S BRIEF

J. LEE RANKIN,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

STANLEY BUCHSBAUM,
EDITH I. SPIVACK,
ROBERT C. DINERSTEIN,
of Counsel.

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APPELLEE'S BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals (R. 35-37, 24 NY 2d 30, 246 N.E. 2d 517 [1969]),* affirming a unanimous judgment of the Appellate Division, First Department of the Supreme Court of the State of New York (R. 30-31, 30 A D 2d 778 [1969]), which affirmed, without opinion, a memorandum determina-

* References designated "R." refer to the Appendix filed in this Court.

tion of the Special Term of the Supreme Court of the State of New York (R. 26).

On June 16, 1969, this Court noted probable jurisdiction (395 U.S. 957).

Question Presented for Review

Whether tax exemptions for real property owned by a religious corporation and used exclusively for religious purposes, as provided by a statute incorporating long accepted public policy, are prohibited by the First and Fourteenth Amendments of the United States Constitution?

The Facts

The action was commenced on June 15, 1967, by the service of a summons and verified complaint upon the Tax Commission (R. 3-7). The Tax Commission served a verified answer containing three separate and distinct defenses on June 28, 1967 (R. 9-10). Thereafter, plaintiff moved for an order striking out defendant's answer and directing the entry of summary judgment for plaintiff upon the cause of action set forth in the complaint (R. 11-17). The defendant opposed the motion and also requested summary judgment dismissing the complaint (R. 17-21). Plaintiff submitted an affidavit in reply (R. 22-23).

In essence, the pleadings relate that plaintiff, as attorney *pro se*, is a citizen of the United States and the owner in fee of real property located in the County of Richmond,

designated on the Tax Map as Section 1, Block 198, Lot 210 (R. 5). His complaint is that the tax exemption granted to religious corporations for real property owned and used by them for religious purposes for the tax year commencing July 1, 1967, "constitutes an involuntary payment by plaintiff to the aforementioned religious organizations, in violation of plaintiff's right of religious freedom" and confiscates his property "without due process of law, in violation of the provisions of the Constitution of the United States of America." (R. 6).

The Tax Commission answered that the taxable status of real property owned by religious corporations was determined in accordance with the law appertaining thereto and that the plaintiff was neither aggrieved thereby nor deprived of any rights sufficient to state a cause of action (R. 9, 19).

Opinions Below

The Appellate Division, First Department of the Supreme Court of the State of New York, unanimously affirmed, without opinion (R. 30, 31), the decision of the Special Term, upholding the constitutionality of the statute in question, which stated in part:

> "Such exemptions are granted in pursuance of long-standing public policy of this State, under a statute which is presumptively constitutional, and which is hereby sustained." (R. 25).

The New York Court of Appeals affirmed (R. 38-39), stating in relevant part:

> "Firmly embedded in the law of this State, both by Constitution (art. XVI, §1) and by statute (Real Property Tax Law, §420), is the doctrine that real property owned by a religious corporation and used exclusively for religious purposes is exempt from taxation (see, e.g., *People ex rel. Watchtower Bible & Tract Soc.* v. *Haring*, 8 N Y 2d 350, 357-358; *People ex rel. Church of St. Mary* v. *Feitner*, 168 N. Y. 494, 497) and research discloses—and the 2½ page brief of the plaintiff-appellant herein cites no authority to the contrary—that courts throughout the country have long and consistently held that the exemption of such real property from taxation does not violate the Constitution of the United States. (See, e.g., *Trustees of Griswold College* v. *State of Iowa*, 46 Iowa 275, 282 [1877]; *Methodist Episcopal Church, South* v. *Hinton*, 92 Tenn. 188 [1892]; *Garrett Biblical Institute* v. *Elmhurst State Bank*, 331 Ill. 308 [1928]; *Lundberg* v. *County of Alameda*, 46 Cal. 2d 644, app. dismd. 352 U. S. 921 [1956]; *General Finance Corp.* v. *Archetto*, 93 R.I. 392, app. dismd. 369 U. S. 423 [1962]; *Murray* v. *Comptroller of the Treasury*, 241 Md. 383, cert. den. 385 U. S. 865 [1966]; see, also *Abington School District* v. *Schempp*, 374 U. S. 203, 301 [*per* Brennan, J., concurring [1963]]. But see, contra, *Engel* v. *Vitale*, 370 U. S. 421, 437, *per* Douglas, J., concurring [1962].) We see no reason for departing from this conclusion in this case."

Constitutional Provisions and Statute Involved

The First Amendment of the Constitution of the United States provides, in pertinent part, as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

Section 1 of Article 16 of the New York Constitution provides, in pertinent part, as follows:

> "§1. [Power of taxation; exemptions from taxation]
>
> Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit."

Section 3 of Article 11 of the New York Constitution provides as follows:

> "§3. [Use of public property, etc. or money in aid of denominational schools prohibited; transportation of children authorized]
>
> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the

legislature may provide for the transportation of children to and from any school or institution of learning."

The New York Real Property Tax Law, Section 420, subd. 1, provides, in pertinent part, as follows:

"§420. Non-profit organizations

1. Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, library, patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association or by another such corporation or association as hereinafter provided shall be exempt from taxation as provided in this section * * *."

Summary of Argument

I. The Court should dismiss the cause of action or affirm the Court below.

The record presented to this Court is inadequate to support a proper review of the important constitutional issue raised in this case. In this posture, the appropriate disposition is the dismissal of the cause of action or affirmance of the judgment of the Court below.

The lack of an adequate record is particularly significant because of the nearly 200-year history of the policy of exempting church property from taxation which is here

challenged. Every state in the Union has a statute or constitutional provision granting such exemptions.

Further, the state courts which have ruled on the issue have uniformly upheld these exemptions. Where appeals from those decisions have come before this Court, they have been dismissed for lack of a substantial federal question or certiorari has been denied.

II. Property tax exemptions for religious institutions are not prohibited by the religion clauses of the First Amendment.

A. There is nothing in the history of the religion clauses of the First Amendment which reveals an intent to bar the tax exemptions under consideration. In fact, the background of those exemptions is rooted in the same history that led to the adoption of the principle of separation of Church and State.

In Virginia, for example, a tax statute was passed in 1800, while James Madison was a member of the General Assembly, which provided for exemption for "houses of divine worship". This was just one year after the passage of a complete disestablishment statute. The District of Columbia passed a tax ordinance which exempted church property in 1802, while Thomas Jefferson was President. The New York experience was similar in that an exemption from property taxation for churches was enacted only a few years after the repeal of colonial statutes designating the Episcopal Church as the established church in several counties in the state.

B. Tax exemptions are consistent with the legislative and judicial policy of neutrality which has characterized separation of Church and State in this country.

Exempting church property used for religious purposes from taxation is not the equivalent of direct subsidy to religion. Subsidies must, of necessity, be unequal in their effect. Exemptions have an equal economic effect on all sects and thus further neutrality by minimizing government involvement in religion.

Just as subsidies cannot be equal, so taxation similarly would impose an uneven burden on the various sects and individual churches.

C. Elimination of exemptions for religious properties would be inconsistent with the treatment afforded other non-profit charitable institutions. The policy in New York, as elsewhere, is to exempt the property of virtually all such organizations from taxation when it is used accordingly.

Taxing church properties would be an unwarranted deviation from this policy which would destroy neutrality. Exemptions given churches as part of the broader classification of public welfare institutions have been upheld by the courts, which have found this uniformity of treatment to be constitutional.

The argument that the secular public welfare policy does not justify exemptions for church property used only for religious purposes is unrealistic. The dual role of the church as religious organization and as private charitable institution cannot be separated for purposes of tax policy.

III. The State may exempt a category of persons from a valid secular law based on religious considerations.

This Court has previously upheld exemptions from general secular laws based on religious considerations without finding such exemptions to constitute an establishment of religion.

This has been the holding where it was found that failure to exempt from the operation of the law would result in a violation of the Free Exercise Clause. But such exemptions have also been sustained where, as a matter of "legislative grace", classifications have been made on religious grounds.

POINT I

In view of the inadequate record presented in this case, the Court should either dismiss the cause of action or affirm the Court below.

In light of the manner in which the constitutional issue under the First and Fourteenth Amendments has been presented in this case, the appropriate disposition is the dismissal of the cause of action or the affirmance, on the merits, of the decision of the New York Court of Appeals.

Such a result is impelled by (a) the lack of an adequate record upon which to base a proper review of the broad constitutional issue raised; (b) the pervasive impact of a reversal of almost 200 years of an undisrupted public policy; (c) the unbroken line of state court decisions up-

holding the constitutionality of the exemptions; and (d) the tacit acceptance of those results by this Court.

This Court has traditionally declined to establish constitutional precedent on an inadequate factual base. Last year, therefore, the Court affirmed the decision of a Texas County Court, sustaining a public drunkeness charge, on the ground that:

> "the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. * * * The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." (*Powell* v. *Texas,* 392 U. S. 514, 521-22 [1968]).

In *Poe* v. *Ullman,* 367 U. S. 497, 501, 509 (1961), after noting probable jurisdiction (362 U. S. 987 [1960]), this Court dismissed an appeal from the highest court of Connecticut which sought a declaratory judgment that certain Connecticut statutes prohibiting the use of contraceptives were unconstitutional. Mr. Justice Frankfurter, speaking for the majority, cited the "lack of immediacy of the threat described", and Mr. Justice Brennan in his concurring opinion questioned the existence of a substantial controversy in light of the "skimpy record" (see, also, *Kimbrough* v. *United States,* 364 U. S. 661 [1961]; *Ellis* v. *Dixon,* 349 U. S. 458 [1955]).

Lack of a substantial record, lack of clarity in presenting the question in this case, and appellant's failure to demonstrate the manner in which he has suffered the injury alleged preclude the analysis required by the issue raised.

There is nothing in the record or in appellant's brief to indicate the basis on which this Court should reverse the legislative policy of New York and every other state in the Union. There is neither a discussion of the constitutional basis of the alleged injury, nor a factual showing that such injury has occurred. As this Court admonished in *Poe*:

> " 'The party who invokes the power [to annul legislation on grounds of its unconstitutionality] must be able to show not only that the statute is invalid but that he has or is immediately in danger of sustaining some direct injury as a result of its enforcement. * * *' *Massachusetts* v. *Mellon,* 262 U. S. 447, 488." (367 U. S. at 504-5).

As in *Powell* and *Poe,* this Court is being asked in the case at bar, to decide a unique and important constitutional question of wide impact which should not be resolved on the basis of the inadequate record presented.

The exemption from taxation of property owned by a religious organization and used by it for religious or other purposes enumerated in the exemption statute, represents an uninterrupted policy in this country beginning in colonial times, see pp. 14-18, *infra.* The practice of granting exemptions, first sanctioned as a matter of historical custom, received statutory or constitutional legitimacy in the various states after the disestablishment of state-supported churches. Continuing, therefore, as a matter of legislative policy in every state and the District of Columbia, religious property exemptions have played an integral part in the public policy of New York as well. The role of religious organizations as private charitable associations, in furthering the secular objectives of the State, has become a fundamental concept in our society and has been recog-

nized by the legislature and courts of New York. *People ex rel. Watchtower Society, Inc.* v. *Haring,* 8 N Y 2d 350 (1960).

In those cases in which state courts have been called upon to decide the constitutionality of tax exemptions for church property, they have uniformly been sustained. See, *e.g., Trustees of Griswold College* v. *State of Iowa,* 46 Iowa 275 (1877); *Yale University* v. *Town of New Haven,* 71 Conn. 316, 42 A. 87, 92 (1899); *Commonwealth* v. *Y.M.C.A.,* 116 Ky. 711, 719, 76 S.W. 522, 523 (1903); *St. Barbara's R.C. Church* v. *City of New York,* 243 App. Div. 371, (2nd Dept., 1935); *Reynolds* v. *Nusbaum,* 19 Wis.2d 148, 115 N.W.2d 761 (1962).

Of four recent cases involving property or other tax exemptions to religious organizations brought before this Court, three [*General Finance* v. *Archetto,* 93 R.I. 392, 176 A.2d 73 (1961), *dism.* 369 U. S. 463 (1962); *Lundberg* v. *County of Alameda,* 46 Cal. 2d 644, 298 P.2d 1 (1956), *dism. sub. nom. Heisy* v. *County of Alameda,* 352 U. S. 921 (1956); *Swallow* v. *United States,* 325 F.2d 97 (C.A. 10th Cir. 1963), *dism.* 377 U. S. 951 (1963) (I.R.C. exemptions)] have been dismissed for lack of a substantial federal question, and in one [*Murray* v. *Comptroller,* 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U. S. 816 (1966)] certiorari was denied. In all of the above cases the issue of the constitutionality of the exemptions was resolved in the state courts squarely in favor of the state or federal policy. In *Lundberg, supra,* for example, the Supreme Court of California said:

> "The principle of separation of church and state is not impaired by granting tax exemptions to religious

groups generally, and it seems clear that the First Amendment was not intended to prohibit such exemptions." (298 P.2d at 8).

A dismissal for lack of a substantial federal question is regarded as a decision on the merits, with the full force and effect of precedent. *Ohio ex rel. Eaton* v. *Price,* 360 U. S. 246 (1951) (mem. of Brennan, J., at 248); see, also, FRANKFURTER and HART, *The Business of the Supreme Court at October Term, 1934,* 49 HARV. L. REV. 68, 77 (1955).

There is a 200-year history of the granting of the challenged tax exemptions which have become a fundamental part of the states' public welfare policy. There is the unblemished precedent in the decisions of state courts and of this Court, in cases challenging the exemption, of support for it. In light of this posture and the inadequate record upon which this case is brought, the Court should dismiss the cause of action or affirm the Court below. As the Court noted in *Parker* v. *Los Angeles County,* 338 U. S. 327, 333 (1949):

"The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity."

POINT II

The inclusion of real property owned and used for religious purposes among other specified exemptions from real property taxation does not constitute a "law respecting an establishment of religion."

A. Property tax exemptions are rooted in the same history as the Establishment Clause.

Property tax exemptions of church property are firmly embedded in the public policy of every state in the Union and the District of Columbia. The practice is both universal and continuous in our history. Today, provision for such exemptions may be found in a state's constitution, its statutes, or both, as in New York. See, generally, Note, *Constitutionality of Tax Benefits Accorded Religion,* 49 COL. L. REV. 968 (1949); PAULSEN, *Preferment of Religious Institutions in Tax and Labor Legislation,* 14 LAW & CONTEMP. PROB. 144 (1950); VAN ALSTYNE, *Tax Exemption of Church Property,* 20 OHIO ST. L.S. 461 (1957).

While the long history of the practice is not determinative of its constitutionality, it is of considerable significance. Particularly relevant is the fact that soon after the adoption of the separation principle in the First Amendment and in early state statutes, both the federal government and the states reaffirmed their acceptance of the policy of exempting church property from taxation. And neither the adoption of the Fourteenth Amendment, nor the explicit application of the religion clauses of the First through the Fourteenth Amendment (See *Cantwell* v. *Connecticut,* 310 U.S. 296 [1940]), have resulted in a disruption of prior state policies regarding exemptions.

Thomas Jefferson and James Madison were the leaders in the fight to ensure religious liberty and disestablishment. The details of their successful struggle to accomplish this in Virginia are set forth in Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education,* 330 U.S. 1, 33 *et seq.* (1947). See, also, 2 BRANT, JAMES MADISON, XXII (1956). Their purpose was achieved in the main by the adoption of the religion clause in Virginia's Declaration of Rights of 1776 and the enactment of Jefferson's Bill for Establishing Religious Freedom in 1786. A final and significant step was the enactment on January 24, 1799, of a statute which repealed various laws which, by inference or reference, recognized the Church of England as an established church (*Virginia Statutes at Large,* Shepherd's Continuation of Hening, vol. II, 149). Nevertheless, just one year later a Virginia statute imposing taxes was passed, which exempted the real property of "houses of divine worship." *Id.,* at 200. At that time Madison was still a member of the Virginia General Assembly.

It should be noted that the religion clauses of the First Amendment have been said to have been designed to provide for the nation the protection which had already been provided for Virginia. See *Everson,* 330 U.S. 1, 39 (Rutledge, J., dissenting). See, also, *McGowan* v. *Maryland,* 366 U.S. 420, 464-465 (1961) (Frankfurter, J., concurring).

Perhaps even more important is what occurred in the District of Columbia. It seems clear that the District is subject to the same constitutional limitations as the federal government and that, therefore, unlike the states, it was

clearly subject to the religion clauses of the First Amendment from the outset. See, *e.g., Capitol Traction Company* v. *Hof,* 174 U.S. 1, 5 (1899); *Wight* v. *Davidson,* 181 U.S. 371, 384 (1901); *Bolling* v. *Sharpe,* 347 U.S. 497, 498-499 (1954); *Neild* v. *District of Columbia,* 110 F.2d 246, 249-251 (D.C. Cir. 1940). Yet in 1802, at a time when Jefferson was the President, a tax ordinance was adopted by the corporation of the City of Washington, under authority delegated by Congress, which exempted, among others, "houses of public worship." (Act of October 6, 1802, ch. 5, ROTHWELL'S LAWS OF THE CITY OF WASHINGTON, 20 [1833]).

The New York experience has been similar. In 1777 the legislature abolished all tax laws dealing with religious maintenance, but continued the tax exemption as a matter of public policy (ADLER, HISTORICAL ORIGIN OF THE EXEMPTION OF CHARITABLE INSTITUTIONS, 76 [Westchester Chamber of Commerce, 1922]).

By 1784 New York was achieving real separation by repealing the colonial acts designating the Episcopal Church as the established church in several counties of the state (Chap. 38 of the Laws of 1784). Yet, the first general tax statute, Laws of 1801, Chapter 17, section 24, which provided for the assessment and collection of taxes upon real and personal property, also stated:

> "That no house or lands belonging to the United States, or to the people of this State, nor any church or place of public worship, nor any personal property belonging to any minister of the gospel or to any priest of any denomination whatsoever, nor any real estate of such minister or priest not exceeding in value one thousand five hundred dollars, nor any college

> or incorporated academy nor any school-house, court-house, gaol, alms-house or property belonging to any incorporated library shall be taxed by any law of this State."

The state's modern legislative history indicates how thoroughly exemption of church property has become a basic tenet of its public policy. At the Constitutional Convention of 1915, a proposition was introduced to repeal all tax exemptions, including those to religious institutions. This was defeated by a vote of 102-13. The reasons given were the deep-rooted tradition, and the fear that religious property would be sold for non-payment of taxes, an idea the legislators found repugnant (Journal of the N.Y.S. Constitutional Convention, 1915, Vol. II, 2227-34).

Repeal of exemptions was again introduced at the Constitutional Convention of 1938, and again defeated—this time in committee. In its report, the Committee on Taxation recommended the grant, repeal or amendment of exemptions by general laws only. However, exemptions for religious, charitable or educational institutions became a matter of constitutional mandate, rather than legislative discretion. That report stated in part:

> "Those corporations are discharging social obligations which the state would otherwise have to assume and are reasonably entitled to constitutional protection in the exemptions granted to them with respect to that property essential to the operation of their work." (Journal of the N.Y.S. Constitutional Convention, 1938, REPORT OF THE COMMITTEE ON TAXATION, Doc. #2, p. 2).

The statutory history of religious property tax exemptions is so closely juxtaposed to that of disestablishment

in this nation's formative period that it is difficult to believe that the former could have survived if considered inconsistent with the latter. The bitter experience of the colonists under religious oppression would have foreclosed such a possibility. The evolution of the secular rationale that churches performed many beneficial public functions merely reinforced the philosophical consistency of the two concepts. Thus, from the beginning of our nation, the tax exemption of church property has been regarded as consistent with the principles of disestablishment.

That this historical evolution is, in fact, consistent with the fundamental principles of separation is the reason that the term neutrality is most often used to characterize that principle. The religious guarantees of the First Amendment were intended both to preserve civil liberty from interference by religious institutions and to prevent the incursion of the state into the area of religious worship (*Everson* v. *Bd. of Education,* 330 U.S. 1, 15 [1947]; Howe, The Garden and the Wilderness, 1-31 [1965]).

B. In practice exemption promotes the same goals as the Establishment Clause.

The mere existence and acceptance of a practice for a prolonged period is, of course, not determinative of its constitutionality. However, when a practice has been accepted by the drafters and supporters of a constitutional provision and has continued to be accepted generally for close to two centuries, it should not be found unconstitutional in the absence of the most compelling reasons for reaching such a result. There are no such reasons. Certainly the appellant has advanced none.

The long established and accepted practice should not be overthrown unless the passage of time has shown that it threatens to promote the consequences which the religion clauses were designed to prevent. See *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 236 (1963) (Brennan, J., concurring). History has shown, however, that these tax exemptions have not tended to defeat the aims of the religion clauses, nor have they in any way disturbed the neutrality between Church and State sought by the First Amendment's drafters.

Those who urge unconstitutionality do not rest their argument on the basic reasons for the adoption of these clauses in the First Amendment. Instead they rely on a syllogism. It is improper, they say, for a state or the national government to raise money for or to pay money to any or all churches. A tax exemption reduces the amount of moneys which churches must expend and, therefore, is an indirect equivalent of payment of moneys to the churches. Hence, the exemptions are invalid. See, *e.g.*, Note, 49 COL. L.REV. 968, 985 (1949).

However, exemptions are not universally regarded as the equivalent of subsidies. See BITTKER, *Churches, Taxes and The Constitution*, 78 YALE L.J. 1285 (July 1969); GIANNELLA, *Religious Liberty, Non-establishment, and Doctrinal Development*, 81 HARV. L. REV. 513 (1968); FREUND, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1687, fn. 16 (1969). Professor Giannella, for example, finds exemptions essential to maintaining separation, in that:

> "to the extent that a church's income depends on free will offerings, exemption serves to preserve volunta-

> rism. We have here a fundamental economic difference between appropriating revenues for churches and failing to send them tax bills. In the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches. In the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." (81 HARV. L. REV. at 553).

Underlying this analysis is Giannella's recognition that a property tax is something other than a mere benefit tax (81 HARV. L. REV. at 552). Thus, payment of an *ad valorem* property tax by a religious organization would mean the diversion of funds contributed for a religious purpose to support a secular system from which the religion clauses of the First Amendment had intended such organizations to remain apart.

In support of the proposition that government subsidy must, *per se*, violate the principle of separation, is the realization that regardless of the intent, any such aid would necessarily favor one sect over another.* As Edmond Cahn has rightly observed:

> "* * * Madison submitted most astutely, the rights of conscience must be kept not only free but *equal* as well. And in view of the endless variations—not only among the numerous sects, but also among the organized activities they pursued and the relative emotional values they attached to their activities—how could any species

* It should be noted that while the policy of granting property tax exemptions to religious institutions is universal amongst the states, most states also have constitutional or statutory provisions prohibiting any form of direct subsidy of religious institutions (*e.g.*, N. Y. Const., Art. 11, §3; see, generally, 49 COL. L. REV. at 990, fn. 146).

> of government assistance be considered genuinely equal from sect to sect? If, for example, a state should attempt to subsidize all sectarian schools without discrimination, it would necessarily violate the principle of equality because certain sects felt impelled to conduct a large number of such schools, others few, others none. How could the officers of government begin to measure the intangible factors that a true equality of treatment would involve, i.e., the relative intensity of religious attachment to parochial education that the respective groups required of their lay and clerical members?" (CONFRONTING INJUSTICE, *"The 'Establishment of Religion' Puzzle,"* 186-87 [1962]).

Thus, in the calculus of separation, direct aid tends to destroy neutrality whereas no-aid preserves neutrality. It is submitted that this dichotomy is equally valid in assessing the propriety of the property tax exemption.

In New York, as in most states, both ownership and exclusive use for religious purposes are required for church property to be eligible for tax exemption (N.Y. Real Property Tax Law, §420(1); Note, 49 COL. L. REV. at 974). The only contact between government and church in this area at present comes in the fairly simple process of determining eligibility for exemption. To tax religious property may result in much greater government involvement. As pointed out at an early New York State constitutional convention (p. 17, *supra*), the state may find it necessary to sell church property to satisfy delinquent tax payments. While the possibility of foreclosure of churches which would arise if they were subject to taxation may not be sufficient to invalidate such taxation as an in-

terference with the free exercise of religion, it does involve an element of interference with free exercise which should be avoided.

In an urban area, for example, a church located in a ghetto neighborhood may have a comparatively low assessed value. But in absolute terms, the ensuing tax burden might prevent its continued existence. A wealthier congregation, on the other hand, might still be able to support its house of worship despite a heavier tax burden. Exemption from taxation permits all churches to co-exist on an equal basis. Their prosperity, both material and spiritual, is dependent only on their members, as Mr. Justice Douglas has remarked (*Schempp, supra,* 374 U.S. at 229). Taxation of church property would permit the state to introduce an extraneous and wholly secular factor, which though intended to be nondiscriminatory, would impose an unequal burden on the various religions and congregations within those religions.

C. Elimination of property tax exemption would treat churches differently from other non-profit charitable institutions.

The conclusion that churches must be taxed despite the granting of exemptions or the inapplicability of the tax to other non-profit charitable organizations, would incorporate into the religion clauses a requirement that churches must pay taxes whereas all others in the same overall class need not. Such a result does not accord with the view that those clauses were designed to require neutrality toward churches and religions.

The similar treatment of the Church and other public welfare organizations is a persistent fact. It is a very real

part of the history of property tax exemptions and reflects the practical realization that the church *qua* church and church *qua* non-profit, charitable institution are logically inseparable for purposes of tax policy. The long history and uniformity of treatment among the states on the policy of these tax exemptions, as Professor Kauper notes (*The Constitutionality of Tax Exemptions for Religious Activities* in THE WALL BETWEEN CHURCH AND STATE, at 110 [1963]):

> "suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices."

This view is particularly pertinent to the case at bar. Churches are only one of a great variety of non-profit organizations which qualify for exemption under the New York Real Property Tax Law. Under Section 420 of that law, exemption is also provided for non-profit organizations set up for the following purposes: moral or mental improvement of men or women; charitable; hospital; educational; public playground; scientific; literary; bar associations; medical society; library; patriotic; historical; cemetery; and for the enforcement of laws relating to children and animals. Other sections in Article 4, Title 2, of that law provide exemptions for a number of other non-profit organizations. These include, among others, opera houses (§426), fraternal organizations (§428), academies of music (§434), veterans' organizations (§452), pharmaceutical societies (§472), and dental societies (§474). That there has been no attempt to single out the Church for grant of favor is clearly shown by the extent to which exemptions have been provided for non-profit corporations. The elimination of exemptions for church properties would be a

departure from the policy of neutrality and would be inconsistent with the principle of separation.

One basis for the tax exemptions granted to religious properties is the recognition of the Church's role in carrying on public welfare activities. In fact, it has been suggested that the Church's social welfare role was an essential element in Madison's concept of that principle. As Professor Cahn submits in CONFRONTING INJUSTICE, at 188:

> "Recognizing organized religion as an ongoing social institution, Madison was much too realistic to overlook the influence it can exert on the general welfare. He proceeded to argue an excellent secular case, proving that here too the establishmentarians were completely mistaken. Religion in a society could indeed serve the general welfare, but government support of religion could only serve the forces of resentment and hatred. Religion could be solidary, but government assistance could be only divisive."

See, PFEFFER, CHURCH, STATE AND FREEDOM, 173 (1953); 1938 N.Y. Constitutional Convention, REPORT OF THE COMMITTEE ON TAXATION AND FINANCE, Chap. X, *Tax Exemptions Under the General Property Tax*, 212-13.

The public policy of exempting religious organizations from property taxation for their charitable and public welfare activities has been sustained in the decisions of this Court and those of the states in which the exemptions were challenged. The public policy of furthering the secular programs undertaken by the various churches through tax exemptions, has usually been considered by the courts as a part of, and consistent with, the principle of neutrality. Usually the issue of tax exemptions to churches, is treated

together with, and compared to, treatment of other private charitable and non-profit organizations, and is discussed in the context of reasonableness. See, *e.g.*, *Fellowship of Humanity* v. *County of Alameda*, 153 Cal. App. 2d 673, 696, 315 P.2d 394, 409 (1957); *Milward* v. *Paschen*, 16 Ill. 2d 302, 309, 157 N.E. 2d 1, 5 (1969); *Washington Ethical Society* v. *Dist. of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957); *Gibbons* v. *District of Columbia*, 116 U. S. 404 (1886).

In the oft-cited case of *Bell's Gap R.R.* v. *Pennsylvania*, 134 U. S. 232, 237 (1890), this Court said:

> "The provision in the Fourteenth Amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from taxation at all, such as churches, libraries and the property of charitable institutions."

This language was cited with approval in several cases thereafter, *e.g.*, *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S. 283, 295 (1898). Individual Justices of this Court have also noted the practice of such exemptions with approval. See, *e.g.*, Reed, J., dissenting in *McCollum* v. *Bd. of Education*, 333 U. S. 203 (1949); Brennan, J., concurring in *Schempp, supra*, 374 U. S. at 301-302.

It has been argued, however, that analogy to other charitable or non-profit organizations cannot, itself, justify total property tax exemptions for religious institutions because the exemption extends to church property which does not serve a public welfare purpose (see, *e.g.*, GIANNELLA, 81

HARV. L. REV. at 550 and PFEFFER, *supra*, at 187). But this argument fails to recognize the fact that there is no practicable way to distinguish between the religious and charitable activities of the Church for purposes of developing a tax policy that maintains the intended neutrality.

As a practical matter, the public welfare activities and the sectarian activities of religious institutions are so intertwined that they cannot be separated for the purpose of determining eligibility for tax exemptions. Often a particular church will use the same personnel, facilities and source of funds to carry out both its secular and religious activities. Taxing the house of worship would, therefore, thwart the secular public policy of encouraging private public welfare organizations.

There is an almost 200-year history of religious property tax exemption to demonstrate that the danger sought to be avoided, namely union or tendency toward union of Church and State, has not materialized. There is nothing in that history or in the record of this case to suggest anything to the contrary.

POINT III

This Court has upheld exemptions from general laws based on religious considerations.

It seems clear from the decisions of this Court that where the State enacts a valid law whose primary purpose is clearly secular, but which may have an indirect inhibiting effect by its operation on the exercise of one or more religions, the State may grant non-discriminatory exemptions from the provisions of that law, based on religious considerations, to that class of persons adversely affected, without the exemption amounting to an establishment of religion.

Certainly, there is no establishment of religion where an exemption from an otherwise valid general law is compelled by the Free Exercise Clause. Thus, the majority of this Court in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), found that appellant had to be excepted from a provision of a South Carolina unemployment compensation law which forced her either to forfeit her benefits under the law or abandon a principle of her faith . The Court held that:

> "Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." (374 U. S. at 404).

Despite its finding in *Sherbert* that appellant could not be deprived of her benefits under the statute, the Court explicitly stated (374 U.S. at 409):

> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist reli-

gion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religions with secular institutions which it is the object of the Establishment Clause to forestall."

Moreover, in circumstances where the Free Exercise Clause did not control, this Court has held that the States or Congress may, as a matter of policy, recognize religious considerations in granting exemptions from a valid general law with a wholly secular purpose, without violating the Establishment Clause. The Sunday Closing Law cases are an example of such situation.

In one of those cases, *Braunfeld* v. *Brown*, 366 U.S. 599, 605 (1961), the Court found that a Pennsylvania statute requiring that certain businesses be closed on Sunday, was not invalid as to appellants, because:

> "* * * [T]he statute at bar does not make unlawful any religious practice of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive."

Although the Court, on the basis of that analysis, rejected the argument that exemption should be compelled for those who observe a day of rest other than Sunday, Chief Justice Warren said (366 U. S. at 608):

> "A number of states provide such an exemption, and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason

and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity."

In another line of cases, certain draft exemptions have been held not to violate the Establishment Clause. *Dickinson* v. *United States,* 346 U. S. 389, 394-95 (1953), upholding draft exemptions for ministers; *United States* v. *Macintosh,* 253 U. S. 605 (1931), conscientious objectors; *cf.,* Judge Weinfeld for the Federal District Court in *United States* v. *Branigan,* 299 F. Supp. 225, 230-31 (S.D.N.Y., 1969), divinity students. In all these instances, the valid secular policy was the draft itself. The exemptions were found, for example, to be a permissible classification, based on "legislative grace," intended to prevent religious sects from being deprived of their clerics (*Dickinson,* 346 U. S. at 304-05; see, also, the discussion by Mr. Justice Harlan in his dissent in *Sherbert, supra,* 374 U. S. at 422-23; Goldberg, J., concurring in *Schempp, supra,* 374 U. S. at 307-308.

There can be little doubt that *ad valorem* property taxes serve a secular purpose. As discussed above, the payment of such taxes might result in an unequal burden that could have an effect on the ability of a person to practice his religion, as for example, where a church or synagogue had to close because non-payment of taxes deprived its congregation of a house of worship. Also, the history of the exemption statutes indicates that such a policy is a reasonable classification consistent with another secular public policy of furthering the charitable work of churches. In this context, tax exemptions fit the pattern of cases in which this Court has sustained exemptions from secular regulations

for certain categories of persons based on religious considerations.

It need not be decided at this time whether the exemption in the case at bar, is compelled by the Free Exercise Clause, as in *Sherbert*, or is merely a matter of "legislative grace" as in *Braunfeld* and *Dickinson*. The telling point is that where an exemption may permissibly be carved out of a valid secular law because of religious considerations, if that exemption is a reasonable one, it will not be found to constitute an establishment of religion.

CONCLUSION

The appeal to this Court from the judgment of the New York Court of Appeals should be affirmed.

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Respectfully submitted,

J. Lee Rankin,
Corporation Counsel,
Counsel for Appellee,
Municipal Building,
New York, New York 10007.

Stanley Buchsbaum,
Edith I. Spivack,
Robert C. Dinerstein,
of Counsel.